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IN THE

Supreme Court of the United States

October Term, 1962.
No. 115

THE DELANO-EARLIMART, EXETER, IVANHOE, LINDMORE, LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA, ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL, TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT,

Petitioners,

vs.

EVERETT G. RANK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

JOHN H. LAUTEN, and
CLAUDE L. ROWE,
910 Security Bank Building,
Fresno 21, California,
Attorneys for Respondent City of Fresno.

CLAUDE L. ROWE,
910 Security Bank Building,
Fresno 21, California,
Attorney for All Other Respondents.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

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IN THE

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THE DELANO-EARLIMART, EXETER, IVANHOE, LINDMORE, LINDSAY-STRATHMORE, LOWER TULE RIVER, MADERA, ORANGE COVE, PORTERVILLE, SAUCELITO, STONE CORRAL, TERRA BELLA and TULARE IRRIGATION DISTRICTS; and THE SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT,

Petitioners,

vs.

EVERETT G. RANK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

I.
OPINIONS IN THE COURTS BELOW.

A. Opinions in the District Court.

The Opinion of the District Court on the trial on the merits in this case is reported as *Rank v. (Krug) United States,* in 142 F. Supp. 1 (1956).

The same District Court rendered an earlier companion Opinion, *Rank v. Krug,* 90 F. Supp. 773 (1950), on the motion to strike the complaint in this case cover-

ing many of the identical issues of this case on the trial on the merits in the District Court *(Rank v. (Krug) United States,* 142 F. Supp. 1 (1956)), *which Decision in 90 F. Supp. 773 (1950) is cited with approval by this Court in United States v. Gerlach Live Stock Co.,* 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).[1]

Two other Opinions in the District Court also involve this same case. These decisions are *Rank v. United States,* 16 F. R. D. 310 (1954), which is not particularly material to this appeal; and *City of Fresno v. Edmonston,* 131 F. Supp. 421 (1955), in which case the District Court as an ancillary proceeding enjoined the California State Engineer, whose duties are now performed by the California Water Rights Board, from interfering with the jurisdiction of the District Court on the trial on the merits in this case by attempting to pass on the applications of the City of Fresno and the United States to appropriate waters of the San Joaquin River before the District Court in this case could make a decision on whether a hearing on these applications to appropriate, before the State Engineer was necessary in view of the long delay of the State Engineer to act on said applications to appropriate and before the District Court in this case could make a de-

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[1] "22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).

claratory judgment on the question of whether the City of Fresno's domestic and municipal applications to appropriate water had priority over the applications of the United States to appropriate water under the California domestic and municipal priority and the California County of Watershed and County of Origin priority laws. Petitioners and Bureau of Reclamation officials appealed this decision of the District Court to the Ninth Circuit of Appeals, *Holsinger v. City of Fresno,* but on motion of respondent City of Fresno this appeal was dismissed by the Court below on June 18, 1957. (*Holsinger v. City of Fresno,* 246 F. 2d 263 (1957)).

The District Court in this case, *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956), gave a declaratory judgment that the applications for water of the City of Fresno for domestic and municipal use had priority over any rights of the United States,[2] but held that nevertheless the administrative agency, the State Engineer (now the California Water Rights Board), had to first hear and rule on the applications before a court could review them,[3] and then ordered the injunction granted in *City of Fresno v. Edmonston,* 131 F. Supp. 421 (1955), dissolved so that the State Engineer (now the California Water Rights Board) could pass on

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[2]*Rank v. (Krug) United States,* 142 F. Supp. 1, 184 (1956). R. 22.

[3]*Rank v. (Krug) United States,* 142 F. Supp. 1, 182-184 (1956). R. 22.

said applications to appropriate.[4] *This Court* has also ruled that the Bureau *must file applications to appropriate water* in the western states under the Basic Reclamation Law of 1902, as amended.[5]

B. Decision of the California Water Rights Board No. D-935, June 2, 1959.

After the Decision of the District Court in this case (142 F. Supp. 1 (1956)), the State Waters Rights Board being relieved from the injunction in *City of Fresno v. Edmonston, supra,* rendered its decision on the applications of the City of Fresno and the United States to appropriate waters of the San Joaquin River (Decision No. D-935, June 2, 1959), after a hearing lasting eighteen months in which the City of Fresno, the United States of America and all petitioning irrigation districts, including both petitioner Madera Irrigation District and Petitioner Southern San Joaquin Municipal Utility District, voluntarily appeared and participated. Under California law this Decision was subject to a judicial review by the courts. The City of Fresno filed a petition to review but the United States did not. The City of Fresno then dismissed its petition to review with prejudice. This decision of the California Water Rights Board has now become final as to all parties in this case including the respondent City of Fresno, the petitioning irrigation districts and the United States of America.[6]

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[4] *Rank v. (Krug) United States,* 142 F. Supp. 1, 183 (1956).

[5] *United States v. Gerlach Live Stock Co.,* 339 U. S. 725, 70 S. Ct. 955, 972, 94 L. Ed. 1231 (1950).

[6] This Decision granted the disputed application to appropriate water of the San Joaquin River to the United States and denied the City of Fresno's application to appropriate, but provided that

C. Opinions in the Court Below.

The opinion of the Court of Appeals dated and entered March 31, 1961, as amended and explained by Opinion of said Ninth Circuit Court of Appeals on rehearing dated and entered the 14th day of August, 1961, as heretofore stated appears as a combined opinion in *State of California, United States of America v. Rank*, 293 F. 2d 340, 360 (1961), and was further supplemented by Opinion on Rehearing dated February 14, 1962, *State of California, United States of America v. Rank*, which as stated does not appear as yet to have been printed in the official reporter.

Two other earlier opinions of the Court below in addition to *Holsinger v. City of Fresno*, 246 F. 2d 263 (1957), also involve this case. They are *United States v. United States District Court*, 206 F. 2d 303 (9th Cir.) (1953) and *State of California v. United States District Court*, 213 F. 2d 818 (9th Cir.) (1954), in which the United States unsuccessfully tried to prevent the District Court from rendering judgment in this case by petitions for writ of mandate and prohibition directed to the District Court, which petitions were denied by the Court below.

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the United States "shall provide water to the City of Fresno out of the Central Valley Project of not less than 50,000 acre-feet after execution of water service contracts with the United States, all in accordance with Federal Reclamation laws; *and subject to such provisions as may be imposed by Final judgment on Rank v. Krug*" (the case presently before this Court) and further providing in substance that the City of Fresno under such contract was to receive only Class I irrigation water without any domestic or municipal priority in years of shortage, as the respondent officials had done in contracts with other California cities.

II.

JURISDICTION.

We adopt the statement of petitioners at page 4 of petitioners' brief.

III.

THE STATUTES AND DOCUMENTS WHICH THE CASE INVOLVES.

A. Acts of Congress.

1. Act of June 17, 1902, 32 Stat. 388 at 389, Sections 4 and 8 (43 U. S. C. 391).
2. Central Valley Project Reauthorization, Rivers and Harbors Act of August 28, 1937, Section 2, 50 Stat. 850.
3. Act of October 14, 1949, 63 Stat. 852 and 853.
4. Act of July 2, 1956, 70 Stat. 483 and 484.

B. Federal Documents.

1. Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935. (Issued in accordance with the Act of December 5, 1924, 43 Stat. 672 at 702, Section 4, Subsection B)

C. State of California Constitution and Statutes.

1. California Constitution, Article XIV, Sec. 3.
2. California Code of Civil Procedure, Sec. 379 and 387.
3. California Water Code Sections: 10505, 11128, 11460 and 11463.

IV.

QUESTIONS PRESENTED FOR REVIEW.

Although the petitioners in their brief submit two major questions for consideration by the Court they also refer to all of the issues set forth by the petitioners in the companion case No. 115, October Term, 1962, of this Court. For this reason we feel all of the following questions are in fact submitted for review by this Court.

1. Whether the determination of the limits of the statutory authority of administrative officials of the United States under the Constitution and Acts of Congress is a judicial or administrative determination.

2. Whether the determination of whether administrative officials of the United States Bureau of Reclamation in this case are acting in excess of and in violation of the authority granted them by the Constitution, the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress providing for the construction and operation of the Central Valley Project in California and other Acts of Congress is a judicial or an administrative determination as ruled by the Court below.

3. Whether the Bureau of Reclamation officials in the construction and operation of the Central Valley Project and petitioners are acting illegally, arbitrarily, unreasonably, capriciously and in excess of and in violation of the authority granted and conferred upon them by the Constitution, the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and the Acts of Congress providing for the construction and operation of the Central Valley Project of Cali-

fornia which require Bureau of Reclamation officials to proceed in conformity with State laws relating to the ownership, control, use, appropriation or distribution of water in the construction and operation of the Central Valley Project of California.

4. Whether Bureau of Reclamation officials are required by the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391) as amended, and other Acts of Congress relating to the construction and operation of the Central Valley Project of California are bound by and required to obey and carry out municipal and domestic water priority laws of the State of California in the construction and operation of the Central Valley Project; and whether Bureau of Reclamation officials are acting illegally and in excess of and in violation of the authority conferred upon them by the Constitution and said Acts of Congress in failing and refusing to carry out such laws.

5. Whether the Bureau of Reclamation officials are required by the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress relating to the construction and operation of the Central Valley Project of California and particularly by the Act of October 14, 1949, 63 Stat. 852 and 853, to reserve for those California counties of origin of river waters and watersheds where river waters originate sufficient water to satisfy the needs of said counties and watersheds in which water originates before exporting said water out of the county and watershed of origin and particularly whether Bureau of Reclamation officials are required by said laws to reserve sufficient water for the original plaintiffs owning riparian lands along the San Joaquin River between Friant Dam and Gravelly Ford Canal and for appellant City of Fresno for its

domestic and municipal water uses, which city lies in both the county of origin and watershed of the San Joaquin River.

6. Whether even Congress itself can authorize the taking by Bureau of Reclamation officials by eminent domain or condemnation proceedings of respondent City of Fresno's domestic and municipal underground percolating water supply percolating from the San Joaquin River and which is admittedly pumped, used and is vitally needed for domestic and municipal uses by its citizens for maintenance of their lives and health for secondary agricultural uses by petitioning irrigation districts where the City has no other available domestic and municipal supply of water.

7. Whether the determination of the question of whether Bureau of Reclamation officials are illegally and unlawfully adding charges in their water rates out of the Central Valley Project in excess of the charges authorized by Congress is an administrative determination or a judicial determination as ruled by the Court below.

8. Whether, where Congress has limited the charge which may be made by Bureau of Reclamation officials for municipal and domestic water out of the Central Valley Project to repayment of (1) cost of construction of the project allocated to municipal use; (2) to cost of operation and maintenance of such portion of the project during the period of repayment of the same; and (3) to interest, Bureau of Reclamation officials are acting illegally and in excess of the authority conferred upon them by Congress by unreasonably, arbitrarily, capriciously and in excess of their administrative discretion adding a profit to said authorized charges for municipal and domestic water and other water au-

thorized by Congress supplied from said Central Valley Project, and whether said respondents are using said profit for illegal purposes.

9. Whether one or more of the named plaintiffs in this action may prosecute the class action which is a part of this case.

10. Whether the determination of the question of whether any charge by Bureau of Reclamation officials in excess of $3.50 per acre-foot for water out of the Central Valley Project to respondent City of Fresno (The Class I irrigation water charge) was unreasonable, illegal, arbitrary, capricious or an abuse of Bureau of Reclamation officials' administrative discretion and in excess of the authority conferred upon them by Congress was a judicial determination as found by the District Court or an administrative determination as held by the Court below, and whether the determination of such a question is a suit against the United States.

11. Whether Bureau of Reclamation officials were authorized by Congress to take the riparian and overlying percolating water rights of the landowners between Friant Dam and Gravelly Ford Canal including those percolating water rights of respondent City of Fresno, by either eminent domain or condemnation and whether the determination of this question is a judicial determination or an administrative determination.

12. Whether petitioners can raise questions for the first time in their appeal briefs or in petitions for rehearing that were not designated in their designation of points on appeal as required by Rule 75(d) Federal Rules of Civil Procedure (28 U. S. C. 75(d)) and particularly whether Bureau of Reclamation officials can raise for the first time the question of whether the

District Court's decision that any charge of the Bureau of Reclamation officials in excess of $3.50 per acre-foot for water from the Central Valley Project (the charge for Class I irrigation water) to the City of Fresno, was unreasonable, unlawful and in excess of the authority conferred upon Bureau of Reclamation officials by Congress was not sustained by the evidence where no such point was set forth in the designation of points on appeal in the Court below nor by petitioners in their petitions for certiorari, and where the Court below did not find that the District Court's determination that the charge to respondent, the City of Fresno, in excess of $3.50 per acre-foot for water was unreasonable was not sustained by the evidence.

13. Whether the United States waived its immunity to suit in this case and whether the Court below properly dismissed the United States as a party defendant, after it had been joined as a defendant in this suit by the District Court.

14. Whether the petitioning irrigation districts were proper parties herein and as such may be relieved from the injunction of the lower Court where with two exceptions they had voluntarily intervened in the case and where all petitioning districts asked for affirmative relief throughout the trial in the District Court, to it, a physical solution, can for the first time on a motion for rehearing after Decision by the Court below, and without designating such right to a dismissal or relief from the injunction of the lower Court in its designation of points on appeal under Rule 75(d), Federal Rules of Civil Procedure (28 U. S. C. 75(d)), or in their appeal brief ask that they be dismissed from this action and relieved from said injunction of said District Court.

V.
STATEMENT OF THE CASE.

Respondents make the same statement which respondents made in their brief in the companion case No. 51, October Term, 1962, of this Court, to which reference is hereby made.

In addition to the statements therein contained respondents would like to point out that the petitioning districts are getting more Central Valley Project water than they can eventually beneficially use. In pointing out the fact that petitioning irrigation districts are getting more Central Valley Project water than they can beneficially use we do not ask the Court to deprive these districts of water nor to rule their contracts invalid. We simply point out the fact to this Court that the petitioning districts, as shown by the actual operation of the Central Valley Project, are getting much more water than they need under their contracts with the United States Bureau of Reclamation. In contrast to the excess water the petitioning districts are receiving, we would like to point out the dire need of the City of Fresno for additional water out of the Central Valley Project.

A. The Petitioning Districts Are Obtaining Much More Central Valley Project Water Under Their Contracts Than They Need.

Although we do not agree with all parts of the decision of the California Water Rights Board we quote the following important portion of its decision of June 2, 1959, which is fully sustained by the annual reports of the United States Bureau of Reclamation:

> "With the exception of the Madera Irrigation District and Chowchilla Water District which have

> used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irr ., presents a strong inference that *some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands.*"
>
> State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959.

In order to give this Court the complete picture of the fact that the petitioning districts have more than enough water for all of their legitimate needs, we ask the Court to take judicial notice as it may do of the common knowledge in the field of agriculture (26.227 Cyclopedia of Federal Procedure) regarding the surplus of agricultural crops in the area in which the district is located, the high cost of the Government to purchase this surplus and the necessity of cutting down on the use of agricultural land throughout the United States and in the petitioning districts as exemplified by the statement contained in the Associated Press Discharge made at Fresno, California, by Secretary of Agriculture Orville L. Freeman.[7]

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[7] "Secretary of Agriculture Orville L. Freeman says America's farmers are producing too much food and fiber to sell—or even to give away.

"He told an audience of 550 yesterday in the Fresno Elks Lodge clubrooms the nation should take 51 million acres of cropland out of production during the next 18 years.

B. The Dire Need of the City of Fresno for a Supplemental Supply of Water Out of the Central Valley Project.

In contrast to the excess and possibly wasteful supply being furnished the petitioning districts under their contracts with the United States Bureau of Reclamation, we here briefly point out the dire need of the City of Fresno for a supplemental water supply.

The Bureau of Reclamation officials' witnesses, admitted the overpumping by the City and that the city needed AN EVENTUAL SUPPLEMENTAL SURFACE SUPPLY OF 100,000 ACRE-FEET PER YEAR.[8] The City Engineer's estimate is 50% higher but in fairness we use the estimates of respondents' engineers.

Mr. Irvin Ingerson, Chief Hydraulic Engineer of the State of California, placed on the stand by the State of California testified that only one-third of the Fresno City water supply in the future could be pumped from the underground and that the City as early as 1952 was in need of an immediate supplemental surface water

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"'And I'm talking about productive land, not just marginal farmland,' he added.

"Even if the country does this, he said it still could produce all that will be needed in 1980, when the United States has a population of 245 million. To produce enough for its own citizens and to send food and fiber to needy nations overseas—but not to produce surpluses—he contended the nation will need only 407 million acres of cropland 20 years from now, instead of the 458 million it now has."

Fresno Bee Article, dated February 11, 1962.

[8]"The Court: He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet.

"By Mr. Rowe: Q. * * * needs another 100,000 acre-feet from another source? A. That is *correct.*" (emphasis ours)

R. 1983, Testimony of Leland Hill, Rep. Tr. 15,613, 15,614.

supply for the other two-thirds of its municipal water supply.[9]

The District Court found that the City was in critical need of water.

> "Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; it is reaching the critical point."
>
> *Rank v. (Krug) United States*, 142 F. Supp. 1, 184 (1956).

In contrast to the California Water Rights Board finding that the petitioning districts are over-supplied with water — even to the point that it may water log and destroy valuable lands within the district — the Water Rights Board found that the City of Fresno was in dire need of water. We quote:

> "Both the City of Fresno and the Fresno Irrigation District are, and always have been, since the formulation of general plans for the Central Valley Project, fairly within the service area of the Central Valley Project."
>
> State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959, p. 68.

> "* * * Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to

[9] "* * * we have to think of the future and the growth of the city, and my thought is at least two-thirds of the total requirements that the city could anticipate in the future should be derived from outside."

R. 1896, Testimony of Irvin Ingerson, Rep. Tr. 12,788, 12,789.

deprive *areas such as the City of Fresno* and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. Rather, we believe that the *Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 11128 and 'County of Origin' Sections 10500, 10504, and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam, should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands."* (emphasis ours)

State of California, State Water Rights Board Decision No. D-935, Adopted June 2, 1959, p. 72.

"Incontestable evidence supports the contention of both the City and the District as to existing deficiencies in water supply. This deficiency is most graphically illustrated by the severe and sustained drop in ground water levels throughout the Unit in recent years indicating a continuous mining of water stored in the underground water basin comprising the Fresno Ground Water Unit * * *. The serious nature of the situation is unquestioned. Obtaining a supply to overcome present deficiencies will not long provide a solution to the problem inasmuch as the deficiencies are increasing at an ever increasing rate as new demands on the supply develop. Eventually new water sufficient to*

meet the present overdraft on the Unit and provide for its ultimate development must be forthcoming if the economy of the area is to flourish." (emphasis ours)

State of California, State Water Rights Board Decision No. D-935, Adopted June 2, 1959, p. 27.

C. Statements in Petitioners' Brief With Which Respondents Agree.

1. We agree that the Central Valley Project Reauthorization, Rivers and Harbors Act of August 28, 1937, paragraph 2, 50 Stat. 850, is a statute "involved in this case".

Moreover, we point out that this statute which has been so many times referred to in reauthorizing the Central Valley Project contains the following provisions as set forth at pages 5 and 6 of petitioners' brief.

> "'* * * the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, * * * That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and *domestic uses*, and third, for power.'" (emphasis ours)

It will be noted in this statute that irrigation and "domestic uses" are put on an equal priority. Congress clearly provided that the Central Valley Project was to supply water for domestic uses.

This act has continued to be the basis of the Central Valley Project and is referred to in every act of Congress reauthorizing the Central Valley Project.

2. We also agree with the following statement at page 7 of petitioners' brief:

> "The Central Valley Project *was originally conceived and planned by the State of California* as part of the State Water Plan. Calif. * * * January 13, 1934, now Calif. Water Code Sec. 11100 *et seq.*" (emphasis ours)

We *partially* agree with the following statement at page 8 of petitioners' brief:

> "* * * *The federally authorized project, although differing in a few details not here material, is essentially the same as the Central Valley Project authorized for State construction.*" (emphasis ours)

There have been numerous changes and amendments however to the original State plan as authorized by Congress. For example, the original State plan provided for a series of pumping stations in the bed of the San Joaquin River to lift the Sacramento River water to Mendota which was changed to and replaced by Tracy Pumping Station and Delta-Mendota Canal (this change was made even after the adoption of the plan of feasibility of 1935, see page 23 of appendix to petitioners' brief in companion case No. 51) and the riparian and percolating water users between Friant Dam and Gravelly Ford Canal were to be fully supplied[10] with all water to which they were legally entitled.

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[10] "9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be

The remaining San Joaquin River water after satisfying the rights of the riparian and percolating water users between Friant Dam and Gravelly Ford Canal was to be used, among other purposes, to supply cities in Merced, Madera, *Fresno,* Kings, Tulare and Kern Counties.

"Prior to December 2, 1935, the defendant through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno,* Tulare, Kings and Kern in the State of California." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 C. Cls. 1, 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"7. The plan as formulated by defendant involved the irrigation of a large area of privately owned land nonriparian to the river situated both to the north and south of Friant in the California counties of Madera, Merced, *Fresno,* Tulare, Kings and Kern." (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403 (1958).

"* * * That the said dam and reservoirs shall be used, first, for river regulation, improve-

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for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *." (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

Overlying percolating rights under California law are considered the same or analogous to riparian rights (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 C. 2d 489, 45 P. 2d 972 (1935).

ment of navigation, and flood control; second, for irrigation *and domestic uses;* and, third, for power." (emphasis ours)

Central Valley Project Reauthorization, Rivers and Harbors Act of August 28, 1937, Section 2, 50 Stat. 850.

"The Central Valley project embodies a plan * * * to provide urgently needed water supplies for *existing* * * * *industrial and municipal developments* in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region * * *." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes *including cities* * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest this flow and regulate its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes * * *." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

We also agree with the following statement appearing at page 9 of petitioners' brief:

> "* * *. The project also includes Folsom Reservoir on the American River, a tributary to the Sacramento River, authorized in 1949."

We also agree with the statement of petitioners made at page 11 of their brief: "* * * the storage and diversion of San Joaquin River water at Friant Dam materially reduces the flows of the San Joaquin River in the 50-mile reach between Friant and Mendota Pool."

However, this does not mean that petitioners have taken these waters by eminent domain as erroneously argued by petitioners in their brief. There were surplus waters in the San Joaquin River upon which the United States had filed applications to appropriate with the California Water Rights Board and which the Board granted *subject to vested rights of the respondents in this case.*

> "Vested rights were unaffected. All permits and licenses issued by the statutory agency (now the State Water Board) are declared therein to be 'subject to vested rights.' (Cal. State Water Board, 'Rules, Regulations and Information pertaining to Appropriation of Water in California' (1956); see, Meridian Ltd. v. City and County of San Francisco, 13 Cal. 2d 424, 450, 90 P. 2d 537, 91 P. 2d 105; Rank v. Krug, D. C., 142 F. Supp. 1)."
>
> *United States v. Fallbrook Public Utility District*, 165 F. Supp. 806 (1958).

Respondents' engineer calculated that if the construction and operation of the Court's plan of physical solution consisting of the check dams was decreed by the Court, there would be over 309,500 acre-feet of surplus water available annually which could be acquired by either the City or the United States filing applications to appropriate with the State Water Rights Board. Acquiring this large amounts of water under its applications to appropriate would *not* be a taking by eminent domain[11] and would cost the Government *nothing,* thus entirely negativing the position of opposing counsel in this case that this water was taken by eminent domain and that the Government would be required to pay heavy costs for the same since here the United States had filed on the surplus water in the river and has been granted a permit to appropriate it, subject however to the vested rights of respondents. (See *United States v. Fallbrook, supra.*) Moreover, the fact that the Government is purchasing certain water between Friant and Gravelly Ford Canal is another clear indication, as repeatedly held by this Court, even in cases cited and relied upon by opposing counsel, that the water between Friant Dam and Gravelly Ford Canal was not and has not been taken by eminent domain.

> "* * *. The fact alleged in the petition that at some time in 1919 the War Department *offered to purchase part of this land* * * * when considered in connection with the other facts stated, serves

[11]R. 182-18, Complaint In Intervention by the City of Fresno.

not to prove, but to negative, authorization to make the taking asserted in this suit."

Portsmouth Harbor Land and Hotel Co. v. United States, 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922).

Clearly since the United States applied to the California Water Rights Board for a permit to appropriate those surplus waters, which permit was granted, "subject to the vested rights" of those riparian and percolating water users below Friant and since the Government has accepted this permit "subject to the vested rights" of respondents, it is submitted that opposing counsels' contention in this case that the United States has taken some of respondents' vested rights by eminent domain is absolutely erroneous and untenable. Moreover, what constitutes the "vested rights" of respondents is a judicial and not an administrative determination. (*Gin S. Chow v. City of Santa Barbara,* 217 C. 673, 22 P. 2d 5 (1933).)

Clearly the United States would be estopped by accepting a permit to appropriate, without cost, several hundred thousand acre-feet of water "subject to the vested rights of respondents" from claiming that they were taking any vested rights of respondents by eminent domain.

D. Statements in Petitioners' Brief With Which Respondents Disagree.

At page 14 of petitioners' brief appears the following erroneous statement:

> "* * * On appeal, the class representation was held insufficient by the Court of Appeals because the plaintiffs also claimed appropriative and prescriptive rights as well as riparian and overlying rights. *State v. Rank*, 293 F. 2d 340, 348 (9th Cir. 1961), 7 R. 374-76. The plaintiffs have not challenged this ruling of the Court of Appeals, so it is no longer in issue in the case."

In our petition for certiorari we objected to the decision that the United States has been improperly joined as a party. One of the reasons for this holding by the Court of Appeals was that all necessary parties were not joined and the Court gave as one of its reasons that there was a lack of plaintiffs for the reason that certain plaintiffs representing the class had a small amount of prescriptive rights.

We submit that under Rule 23(c) of this Court a general statement of error such as our objection to the Court of Appeals' finding that the United States was improperly joined as a party covers all subsidiary issues. Our answer to this ruling of the Court below is also set forth at pages 125 through 129 of our brief in companion case No. 51, October Term, 1962, of this Court, which is incorporated by reference herein.

At page 16 of petitioners' brief petitioners refer to a statement of the writer on constitutionality. That statement was made before the ruling of this Court in *United States v. Gerlach Live Stock Co., supra.*

At page 18 of petitioners' brief appears the following statement:

> "* * * since June 30, 1953, the United States, through the defendant officials and other employees, has *operated the dam without judicial interference.*" (emphasis ours)

Although the statement itself may be true it should be explained. The petitioners instead of allowing only 60,000 acre-feet of water[12] annually, although representing to Congress that they were going to release at least 150,000 acre-feet or more for the riparian owners between Friant and Gravelly Ford,[13] as they threatened to do, pending the final determination of this action have let the staggering amount of 626,000 acre-feet per year flow down the river,[14] much more than the

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[12]R. 1981, Testimony of Leland K. Hill, 14,980.

[13]"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284, Pltf. Ex. 121, Testimony U.S.B.R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate 80th Congress, 1st Session on S-92, p. 708, Rep. Tr. 3072.

[14]1951-1952, 1952-1953, 1953-1954, 1954-1955, 1955-1956, 1956-1957, 1957-1958, 1958-1959, 1959-1960, U. S. Geological Survey, Water Supply Papers.

R. 2282, Pltf. Ex. 116, 2909.

183,000 acre-feet which plaintiffs' plan of physical solution provided for.[14a]

Petitioners at page 20 of their brief make the following erroneous statement:

> "That judgment declared the water rights of all the plaintiffs, i.e., the named plaintiffs, the members of the class they purport to represent, and the plaintiffs in intervention Tranquillity Irrigation District and City of Fresno, against the defendants, i.e., the United States, the federal officers, and the districts. It did not *adjudicate the rights of the plaintiffs against each other.*" (emphasis ours)

This statement is incorrect as shown by the discussion of the petitioner City of Fresno at pages 135 through 137 of its brief in the companion before this Court, Case No. 51, October Term, 1962, which portion of said brief is herein incorporated by reference.

At page 26 of petitioners' brief, petitioners make the statement that the decision of the Court below to the effect that the Bureau of Reclamation had not exercised its power of eminent domain was wrong, is incorrect as shown by pages 137 to 151 of petitioners' (respondents herein) brief in the companion case No. 51, October Term, 1962, of this Court, reference to which is herein expressly made and by reference incorporated herein.

[14a]R. 2282, Pltf. Ex. 116, 2909.

VI.
ARGUMENT.

Petitioners raise two points in their argument. *First* that the Court of Appeals erred in holding that the United States has not acquired the rights of the respondents by eminent domain; and *second*, that the judgmen of the District Court against the districts should be reversed for lack of a justiciable issue between respondents and the petitioning districts. Both of these arguments are without merit. Both arguments, however, involve all of the questions presented for review set forth in Chapter IV of this brief.

A. The United States Has Not Acquired the Rights of the Respondents by Eminent Domain and the Court Below Is Correct in Its Finding in This Regard. Furthermore, the Bureau of Reclamation Officials Cannot Legally Acquire the Rights of the Respondents by Eminent Domain and the Lower Court Was in Error in Holding That These Rights Could Be Acquired by the Bureau of Reclamation Officials.

Although we agree with the Statement of the Court below that the Government has not acquired any rights of respondents by eminent domain, it is our position that the United States Bureau of Reclamation officials were not authorized by Congress to take any of the rights of respondents and that the Court below was in error in holding that water rights of respondents could be taken by eminent domain.

The District Court held that the City of Fresno, under the California County of Origin and watershed of origin laws was entitled to water to fulfill its mu-

nicipal and domestic requirements before any water was taken by Bureau officials out of either the watershed, within which lies the City of Fresno, or the County of Fresno—one of the counties in which the San Joaquin River originates[15] and in which county the City of Fresno is also located, by means of the Friant-Kern Canal (*Rank v. (Krug) United States,* 142 F. Supp. 1, (1956).)

The District Court further ruled that these priority rights of the City of Fresno and the other respondent were enforceable by *injunction* against the Bureau of Reclamation officials and that if interfered with by the Bureau of Reclamation officials the City of Fresno was not limited to a claim for damages in the United States Court of Claims. (*Rank v. (Krug) United States,* 142 F. Supp. 1 (1956).)

The court below over-ruled the District Court and indicated in its opinion that although the United States had not acquired these rights by either proceedings in condemnation or by seizure under eminent domain that the officials of the United States Bureau of Reclamation could take these rights either by eminent domain or condemnation upon paying for them. *State v. Rank,* 293 F. 2d 340.

It is submitted that this portion of the opinion of the court below is in error since Congress never authorized such a taking of water under the various Central Valley Projects Acts adopted by Congress and that since Congress had not authorized such a taking the

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[15] "* * * The San Joaquin River is a natural watercourse arising in the Sierra-Nevada in Fresno and Madera Counties." *Meridian Ltd. v. San Francisco,* 13 Cal. 2d 424, 429; 90 P. 2d 535, 91 P. 2d 105 (1939).

Bureau of Reclamation officials are powerless to take these rights by eminent domain, condemnation proceedings or in any other manner, and that respondent officials are acting in excess of their statutory authority in attempting to do so. Respondents' views on this statement of the law now follow:

1. The Rights of the Bureau of Reclamation Officials to Take the Water Rights of the City of Fresno and the Other Respondents by Eminent Domain Under the Central Valley Project Are Limited by the Power Expressly Given Them by Congress.

The power of United States Administrative Agencies is limited by the powers expressly given them by Congress.

> "Where Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (Syllabus)
>
> *Stark v. Wickard, Secretary of Agriculture*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733. (Syllabus)

(a) *The Power of Eminent Domain Is Vested Solely in Congress.*

The power of eminent domain is vested solely in Congress.[16]

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[16] "The power of eminent domain is vested solely in Congress and the executive has no inherent power in nature of eminent domain." (Syllabus)

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is no act of Government." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

2. Congress Never at Any Time Granted the Bureau of Reclamation Officials the Power to Take Water Needed in California County or Watershed of Origin by Either Condemnation or Eminent Domain, but Expressly Withheld This Power.

It having been shown that only Congress had the power to grant to the Bureau of Reclamation officials the right to take property for Central Valley Project operations by either eminent domain or condemnation proceedings, it will now be shown that Congress specifically withheld from the Bureau of Reclamation officials the right to take water needed by the county of origin and watershed of origin under the Central Valley Project.

3. The Acts of Congress Make the Bureau of Reclamation Officials Subject to California's County of Origin and Watershed Acts.

The first enactment of Congress governing the operation of the United States Bureau of Reclamation provided that all reclamation projects must be operated in accordance with state law.

> "Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use or destruction of water used in irrigation or any

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"* * *. Contrary to contention that President had 'inherent' power to be exercised in public interest, the president's power to issue Executive Order directing Secretary of Commerce to take possession of plants of steel companies involved in labor dispute would have to stem either from an act of Congress or from the Constitution itself." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

vested right acquired thereunder and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws."

Act of June 17, 1902 (32 Stats. at L. 388, Chapter 1093) 43 U. S. C. 391.

This court has held that the Act of June 17, 1902, requires Bureau officials building reclamation projects to proceed in conformity with California laws.

"The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 Act, been zealous in maintaining compliance with Section 8 of the 1902 Act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws."

United States v. Gerlach Live Stock Co., 339 U. S. 725 at 740. 70 S. Ct. 955 at 963. Footnotes 14 and 15.

Congress again in 1956 in legislation *concerning the Central Valley Project* readopted the same provisions of the basic reclamation law of 1902.[17]

MOREOVER, CONGRESS SPECIFICALLY BY STATUTE REQUIRED THE BUREAU OF RECLAMATION OFFICIALS TO FOLLOW CALIFORNIA'S COUNTY OF ORIGIN AND WATERSHED OF ORIGIN ACTS, both of which expressly prohibit the Bureau of Reclamation officials from taking water needed by either the county of origin or watershed of origin by condemnation or eminent domain proceedings.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.
>
> "* * * the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREA OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)
>
> Act of Oct. 14, 1949, 63 Stats. 852, 853 (1949).

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[17] "Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provision of this Act, shall *proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government* or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided:* That the right to the use of water acquired under the provisions of this Act *shall be appurtenant to the land irrigated* and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto)."

Act of July 2, 1956, 70 Stat. 483 at 484.

4. Administrative Interpretation.

Administrative interpretation of a statute is also important. The Bureau of Reclamation has interpreted the congressional acts involving the Central Valley Project as requiring them to leave sufficient water in the county of origin and watershed of origin to satisfy all of the present and ultimate needs of these two areas and only to take *surplus waters* for exportation out of the county of origin and watershed of origin.

> "66. In addition to respecting all existing water rights, *the Bureau* in this report has complied with *California's county of origin legislation,* which requires that water shall be reserved *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.*" (emphasis ours)
>
> Senate Document, 113, 81st Congress, page 65, Plaintiff's Exhibit 136, R. 2285.

It will be noted that Bureau officials said "water" would be reserved for the county and watersheds of origin—not damages.

The above is a clear admission that the Bureau itself has and now administratively interprets the Basic Reclamation Act of 1902 to the effect it is bound by California's *County of Origin and Watershed of Origin* Legislation to leave enough *water* (not money) to meet the needs of the County of Origin and Watershed of Origin and to only take *surplus waters* for their reclamation projects from these areas of origin as shown by the

last two lines above quoted from Senate Document 113, 81st Congress (R. 2285) which we again quote:

> "* * * only surplus *waters* will be exported elsewhere. * * *." (emphasis ours)
>
> Senate Document 113, 81st Congress, 1st Session, Plaintiffs' Exhibit 136, R. 2285.

5. Congressional Committee Reports.

That the Bureau of Reclamation is prohibited from acquiring water needed by the county of origin and watershed of origin also appears from the latest committee report of Congress dealing with the Central Valley Project, which of course, is a well-recognized aid upon which the courts may rely in interpreting a statute.

> "The opinions of the State Attorney General mentioned above declare that both the State and Federal Government in the operation of the CVP are subject to the *restrictions* of the County Origin Law and the Watershed Protection Act." (emphasis ours)
>
> Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246 at page 516 (1956).

Having shown that Congress intended that the Bureau of Reclamation officials' right to take water by either eminent domain or condemnation proceedings was to be limited by the provisions of the California County of Origin and Watershed of Origin Acts, a specific look at these acts, together with the interpretation placed thereon by the California Legislature in adopting these acts by the Attorney General of the state of California,

and the California administrative agencies applying them, also clearly indicates that the Bureau of Reclamation may not condemn or take by eminent domain waters needed by the county of origin and watershed of origin.

6. The California Constitution and Statutes Are Clear and Definite That No Water Needed by Either the Watershed of Origin or County of Origin May Be Diverted by the Bureau of Reclamation Officials Out of Said County of Origin or Watershed of Origin.

Until a few years before the Central Valley Project Act, a riparian owner was entitled to have all of the waters of a stream flow past his riparian land. In order to make the Central Valley Project possible, so that the Government could take surplus waters from the rivers involved in the Central Valley Project, it was necessary to amend the State Constitution of the State of California which was done November 26, 1928.

> "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably for the beneficial use to be served, * * * provided, however, that *nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian* under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."
>
> West's Annotated California Codes, Constitution, Article XIV, para. 3, page 265.

California Legislative Enactments also require that only surplus waters may be exported from the county and watershed of origin.[18]

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[18]"*Prior Right to Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed area, or any of the inhabitants or property owners therein."

Water Code, Sec. 11460.

"*Exchange of Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the *watershed* or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were in the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange." (emphasis ours)

Water Code, Sec. 11463.

"*Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof,* including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Sec. 1.)" (emphasis ours)

Water Code, Sec. 11128.

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

Water Code, Sec. 10505.

7. Reservation of Water for the Areas in Which It Originates Is the Fundamental Law of California Irrespective of Statute According to the Decisions of the California Supreme Court.

Irrespective of the acts of the California Legislature *it is the basic and fundamental law of California,* as shown by the decisions of the California Supreme Court that areas in which water originates shall be protected from exportation out of the area in which waters originate.

Miller v. Bay Cities Water Co., 157 C. 256, 270, 107 P. 115, 27 L. R. A., N. S 772 (1910);

Burr v. Maclay Rancho Water Co., 154 C. 428, 436, 98 P. 260 (1908).

"* * * the doctrine of protection of the watershed of origin has been consistently applied by the California Courts in the protection of riparian and overlying rights in recognition of the facts that the natural advantages of a surface or underground water supply was the principal reason for the settlement and development of the counties and watersheds where water originates. *Bathgate v. Irvine,* 1899, 126 Cal. 135, 143, 58 P. 442; *Peabody v. City of Vallejo,* 1935, 2 Cal. 2d 351, 370, 371, 40 P. 2d 486."

Rank v. (Krug) United States, 142 F. Supp. 1 at 150.

8. The Views of Other California Agencies on the Rights of the City of Fresno and Other Landowners in the County of Origin and Watershed of the San Joaquin River.

Although we do not agree with all of the State Water Rights Board of the State of California's decision,[19] on June 2, 1959, the Board correctly ruled that the Bureau of Reclamation officials were bound to furnish water to the City of Fresno and other landowners.

In the above decision the United States and all parties in this action were present and although there is a judicial review by California Courts provided for this decision, none of the parties asked for a judicial review except the City of Fresno which later dismissed its petition for review.

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[19] "* * * as a matter of both state and federal law, it appears that the United States, the Bureau of Reclamation as well as its parent organization, the Department of the Interior and the Secretary thereof, are obligated to observe Water Code Sections 11460-11463, in carrying out the Central Valley Project. * * *."

"* * *. Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive areas such as the City of Fresno and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. * * * we believe that *the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 'County of Origin' Sections 10500, 10504 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands.*" (emphasis ours)

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, Page 72.

9. Opinions of the California Attorney General.

The Attorney General of the State of California in his opinions to the State Legislature took the position that the Bureau of Reclamation officials were powerless to take either by proceedings in condemnation or by seizure under eminent domain under the Central Valley Project the rights of the California landowners given them by the county of origin and watershed of origin protective acts.

> "The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture. * * *"
>
> 25 Opinions, Attorney General p. 21, (1955)

The Attorney General of California has clearly ruled that the rights of the county and watershed of origin are not subject to condemnation nor taking by eminent domain. The above opinion was given by California Attorney General "Pat" Brown, dated January 5, 1955, in answer to the following two questions referred to him as California Attorney General:

> "(2) Under these code sections, would water appropriated for use in areas outside the county where the water originates, or the watershed where the water originates and areas immediately adjacent thereto, be made available later for use in such local areas, if the water became necessary for their development at some time in the future?

"(3) Are Water Code sections 11460 and 11463 applicable to the United States in the construction and operation of the Central Valley Project?"

25 Opinions, Attorney General, p. 9, (1955).

to which above questions California's Attorney General gave the answers:

"(2) In the circumstances specified in the statute, Water Code Sections 10505 and 11460 would require that *water* which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent thereto, be withdrawn from such outside areas and made available for use *in the specified area of origin.*

"(3) Water Code Sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project * * *."

25 Opinions, Attorney General p. 9, (1955).

"VI. Reversion of Water to Areas of Preference When Needed.

"From what has already been said, it follows that the interim use of water reserved for counties of origin under section 10505, or for watersheds of origin under section 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case *there would be no right of reimbursement for the project works* which had been used for

the interim use of the water exported." (emphasis ours)

25 Opinions, Attorney General, p. 27, (1955).

If *waters* originating in the county and watershed of origin heretofore taken and used by the United States in the Central Valley Project may be withdrawn to the county and watershed of origin without even paying for portions of the project rendered useless thereby, how can opposing counsel conceivably argue that the government has the right to take these waters by either condemnation proceedings or eminent domain.

10. Determination of the Limits of the Statutory Authority of an Administrative Agency, Is a Judicial Function and Is Not a Matter of Administrative Discretion.

As shown the determination of the limits of the power of Bureau of Reclamation officials of the amount of water they may take from a watershed and county of origin to distant non-riparian lands lying outside of the watershed and county of origin, is a *judicial, not a discretionary administrative decision.*[20]

11. Authorities Cited by Petitioners Distinguished.

In discussing the decisions cited by opposing counsel, two articles, namely, Graham's article in 38 California Law Review 585 and 18 Ops. Cal. Atty. Gen. 31, should be commented upon. Both of these articles were written by opposing counsel during this trial before the District Court in an effort to discredit the decision of

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[20]"The responsibility of determining limits of statutory authority of administrative agencies is a judicial function." (Syllabus) *Stark v. Wickard, Secretary of Agriculture*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733.

the District Judge in this case on petitioners' motion to dismiss, which case is entitled *Rank v. Krug*, 90 F. Supp. 773 (1950) and has been cited with approval by this Court.

> "22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90 F. Supp. 773, consistent with the views we take of the issues here involved."
>
> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).

Opposing counsel then attempted to rely upon these two articles as "authorities". Opposing counsel in so doing were attempting to pull themselves up by their own bootstraps. Many erroneous statements in these two articles could be cited. First is the erroneous statement by opposing counsel Graham in which he claimed that the petitioning districts, and not the respondent riparian owners below Friant Dam, had prevailed in this case of *Rank v. Krug*, 90 F. Supp. 773, *supra*. We quote from page 602 of this strange California Law Review article in which former opposing counsel Graham claims the petitioners herein, and not the respondents herein, "won the war"—so to speak—before the District Court.

> "In connection with the litigation in this area, the Irrigation Districts Association of California recently published a brochure entitled 'Whose Water?', which is No. 16 of a series. The document quotes copiously from Judge Hall's opinion of April 13, 1950, in Rank v. Krug, * * *. By

reason of a nice selectivity in the employment of heavy black type, *an otherwise uninformed reader might be led to conclude that the plaintiffs had prevailed.*" (emphasis ours)

38 California Law Review 602.

In other words the writer makes the statement in his law review article in effect that the Respondent riparian land owners below Friant Dam have not prevailed. That respondents did prevail and that the Law Review article is inaccurate appears from the most cursory reading of the case. We quote from *Rank v. Krug,* 90 F. Supp. 773 (1950), referred to in that article:

"* * *. The conclusion may be justified that the report indicated an intention to take all the water below Mendota, and replace it with other water. This court can see no justification for the conclusion that Congress, in making appropriations on the *basis of the feasibility report indicated an intention to take the water rights of the plaintiffs' lands above Mendota.* This conclusion is further borne out by the statement in the report 'that the works of the project will provide an *adequate* water supply for all purposes,' and that this project is not designed for bringing new lands into cultivation, but for the *maintenance of existagricultural development and existing civilization* of a high type,' and 'the project will not bring into production new agricultural areas, but will maintain *present values* and civilization.' Obviously, if, 'existing agricultural development and '*present values*' were to be *maintained* by an '*adequate*' water supply, an intention cannot be read into

the report to take away the rights of the plaintiffs and their class whose lands are *below* Friant and *above* Mendota." (emphasis partially ours)

Rank v. Krug, 90 F. Supp. 773, 792 (1950).

"* * *. It appears from what has been said that *there was and is no congressional intention to take plaintiffs' water rights at all.*"

Rank v. Krug, 90 F. Supp. 773, 804 (1950).

"Riparian owners whose lands were located on river below dam constructed under federal reclamation laws *would not be denied injunctive relief against officials of the Bureau of Reclamation*, in operation of the dam, from interfering with their right of use of waters of river for agricultural and domestic purposes *on ground that they had a plain speedy and adequate remedy at law under the Tucker Act*. 28 U.S.C.A. Sections 1346, 1402; 1491 et seq.; 43 U.S.C.A. Section 372 et seq.; Water Code Cal. Sections 1 et seq., 11100-11855; Const. Cal. art. 14, Sections 1, 3." (emphasis ours)

Rank v. Krug, 90 F. Supp. 773, 777 (1950) (Syllabus).

At page 29 of petitioners' brief appears the following statement which we submit is clearly erroneous:

"* * *. The availability of a suit for damages against the United States precludes an injunction against the defendant officers as individuals."

This statement is not true as shown by the same District Court's decision in *Rank v. Krug*, 90 F. Supp.

773 (1950) cited with approval by this Court.[21] The District Court in this case correctly ruled as follows:

> "Riparian owners whose lands were located on river below dam constructed under federal reclamation laws *would not be denied injunctive relief against officials of the Bureau of Reclamation*, in operation of the dam, from interfering with their right of use of waters of river for agricultural and domestic purposes *on ground that they had a plain speedy and adequate remedy at law under the Tucker Act.* 28 U.S.C.A. Sections 1346, 1402; 1491 et seq.; 43 U.S.C.A. Section 372 et seq.: Water Code Cal. Sections 1 et seq., 11100-11855; Const. Cal. art. 14, Sections 1, 3. (emphasis ours)
>
> *Rank v. Krug*, 90 F. Supp. 773, 777 (1950) (Syllabus).

Likewise, the following comment upon *Malone v. Bowdoin*, 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962) appearing at page 29 of petitioners brief is incorrect:

> "Unlike *Malone v. Bowdoin*, 369 U. S. 643 (1962), this is not a case where the authorized defendant officials denies liability. Here the liabilities are authorized to be incurred and the duty to pay has been recognized."

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[21] "22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90 F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 754, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).

We quote the correct text from *Malone v. Bowdoin* in which this Court made the following comments:

> "Action of a federal officer affecting property claimed by a plaintiff can be made basis of a suit for specific relief against the officer as an individual *only if the officer's action is not within the officer's statutory powers,* or, if the powers or their exercise in the particular case are constitutionally void." (emphasis ours) (Syllabus)
>
> *Malone v. Bowdoin,* 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962).
>
> "* * *. Nor has it been asserted that the petitioner was exceeding his delegated powers as an officer of the United States * * *."
>
> *Malone v. Bowdoin,* 369 U. S. 643, 82 S. Ct. 980, 984, 8 L. Ed. 2d 168 (1962).

Here there was a specific allegation that the Bureau of Reclamation officials were acting in excess of their authority and the specific acts of Congress and the State of California alleged to be violated specifically set forth.

Hurley v. Kincaid, 285 U. S. 95, 52 S. Ct. 267, 16 L. Ed. 637 (1932), is clearly distinguished.[22]

> "* * *. Nor do the defendants come within Hurley v. Kincaid, 1932, 285 U. S. 95, 52 S. Ct.

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[22] "Local Municipal Industrial and Miscellaneous Uses. In addition to the irrigation requirements * * * water is needed in the Central Valley Basin for miscellaneous purposes, including *urban areas* * * * industrial areas, * * * household gardens * * *. "East Side Upper San Joaquin Valley 200,000 ac. ft."

Comprehensive Plan for Water Resources Development, Central Valley Basin, United States Department of the Interior, Harold L. Ickes, Secretary, Project Planning Report No. 2-4.0-3, November, 1945, page 40.

267, 76 L. Ed. 637, because the legal authority of the defendants to take the plaintiffs' property was there conceded. Where that is the case, which is not so here, the court merely held plaintiffs could not enjoin because they were not paid in advance."

Rank v. Krug, 90 F. Supp. 773, 803 (1950).

At the sake of being repetitious we again point out that said case in 90 F. Supp. 773 has been cited with approval by this Court.

The case of *Collier v. Merced Irrigation District,* 213 C. 554, 2 P. 2d ..... (1931) is not in point. It was a case decided before the 1928 California constitutional amendment when a riparian owner was entitled to the full flow of the river by his place. (*Herminghaus v. Southern California Edison Co., supra*). A good distinction between this case and the present case appears in *Rank v. (Krug) United States,* 142 F. Supp. 1, 139-142 (1956).

"Furthermore, *in the Collier case,* by stipulation of the defendant, there was incorporated into the judgment a requirement that there by available to the plaintiff and his land during the irrigation season, *such amount of water as was reasonably required by the plaintiff by reasonable methods* of diversion, to the extent and quantity of 18 cubic feet per second, which was not to be diminished by any prior riparian users, and which the Court found was sufficient to meet the needs of plaintiff's 527.86 acres of land for water at all times. *He in effect had a physical solution, and was held to be also entitled to damages. Thus, even though*

it was there held that a public use had intervened on the basis of an estoppel, the doctrine was invoked only as to water above that needed by plaintiff, which, under the law as it now exists would be surplus waters. Furthermore, the dam in the *Collier case was completed in 1926—two years before the Constitutional amendment of 1928—and the plaintiff was then entitled to bring suit to compel the whole flow of the river, surplus and nonsurplus.*" That right to compel the flow of surplus water was taken away by the 1928 amendment, as hereinbefore shown. Hence, the same case could not arise since 1928 because of the absence of any right to object to the appropriation of surplus waters—a right that existed in 1926 when the dam in the Collier case was built." (emphasis partially ours)

Rank v. (Krug) United States, 142 F. Supp. 1, 141 (1956).

In *this* case the respondents are interested in water, not damages. The Bureau officials were not authorized to take the riparian and percolating water rights between Friant Dam and Gravelly Ford Canal or in fact between Friant Dam and Mendota Dam. We again quote from *Rank v. Krug*, 90 F. Supp. 773 (1950):

"* * *. The conclusion may be justified that the report indicated an intention to take all the water below Mendota, and replace it with other water. This court can see no justification for the conclusion that Congress, in making appropriations on the *basis of the feasibility report indicated an intention to take the water rights of the plaintiffs' lands above Mendota.* This conclusion is further

borne out by the statement in the report 'that the works of the project will provide an *adequate* water supply for all purposes,' and this project is not designated for bringing new lands into cultivation, but for the *maintenance of existing agricultural development and existing civilization* of a high type,' and 'the project will not bring into production new agricultural areas, but will maintain *present values* and civilization.' Obviously, if '*existing*' agricultural development and '*present* values' were to be *maintained* by an '*adequate*' water supply, an intention cannot be read into the report to take away the rights of the plaintiffs and their class whose lands are *below* Friant and *above* Mendota." (emphasis partially ours)

Rank v. Krug, 90 F. Supp. 773, 792 (1950).

The case of *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. E. 287 (1922), is clearly distinguishable. In that case the question of a taking by eminent domain even though guns of the United States admittedly had been shot over plaintiff's lands for some time was held a question of fact to be later determined by the Court of Claims. We quote from the syllabus in that case:

"Whether the repitition through many years of the acts of firing coast-defense guns across claimant's land and the establishment of a fire-control thereon show an abiding purpose to fire the guns whenever the United States sees fit, or constitute only occasional torts, *is for the Court of Claims to*

determine on evidence, and not on demurrer." (emphasis ours)

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922).

What is more important the case really sustains respondents' position since in the present case the Government has been engaged for a period of nearly sixteen years in attempting to purchase certain water rights of the land owners between Friant and Gravelly Ford Canal. As stated in *Portsmouth Harbor Land & Hotel Co. v. United States, supra*, this effort "serves not to prove but to *negative* authorization to make the taking asserted in [illegible]s suit".

"* * *. The fact alleged in the petition that at some time in 1919 the War Department *offered to purchase part* of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit." (emphasis ours).

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), is clearly distinguishable since the "path of glide" taken by airplanes taking off and taking off over plaintiffs' lands which adjoined the municipal airport was approved by the Civil Aeronautics Authority and since in that case the United States had leased the airport for a particular purpose.

and the officers of the United States were clearly acting within the scope of their authority. In the present case the rights of the respondents under the Central Valley Project between Friant and Gravelly Ford Canal were to be respected, not taken, as shown by the following decision of the Court of Claims:

> "9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *." (emphasis ours)
>
> *Wolfsen v. United States,* 162 F. Supp. 403, 411 (1958).

In regard to the statement of the writer made on March 8, 1950, referred to at page 16 of petitioners' brief there can be said that the writer still feels that there is still a question of constitutionality involved particularly in the Act of August 4, 1939. However, this statement was made before the decision in *Rank v. Krug,* 90 F. Supp. 773 (1950), which came out five weeks later and the decision of this court in *United States v. Gerlach Live Stock Co.,* 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950), which also came out after the statement was made by writer. Writer feels that the law as set forth in *Rank v. Krug, supra,* and *United States v. Gerlach Live Stock Co., supra,* states the law applicable to the rights of respondents.

B. Petitioning Districts Should Not Be Allowed to Withdraw From This Case and the Court Below Was in Error in Modifying the Injunction as Against the Petitioning Districts.

The District Court granted a conditional injunction against the officials of the United States Bureau of Reclamation and all the petitioning districts.

The Court of Appeals modified the injunction so as not to be applicable to the districts [R. 401-402]. However, the Court of Appeals refused to reverse the remainder of the judgment against the districts or to dismiss them as parties. It is submitted that the lower Court was in error in ordering the District Court's injunction modified so as not to be applicable to the districts. However, it was correct in sustaining the District Court in the remainder of the District Court's judgment against the districts.

1. The Basic Reclamation Act of June 17, 1902, Specifically Provided That the Water Under Any Reclamation Project Was Appurtenant to the Lands Served.

> "* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."
>
> Act of June 17, 1902, 32 Stat. 388 at 390 (43 U. S. C. 391).

Under the Central Valley Project legislation, Congress in 1956 again re-adopted this feature of the Basic Reclamation Act of 1902.

> "* * * that the right to the use of water acquired under the provisions of this Act *shall be*

appurtenant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right." (emphasis ours)

Act of July 2, 1956, 70 Stat. 483 at 484.

Therefore, whatever water rights legally given the districts under the contract between California Regional Director of the Bureau of Reclamation, Boke, and the petitioning districts became the property of the landowners *subject to all prior rights of plaintiffs and the City of Fresno*[23] wholly distinct from the property right of the Government in the irrigation works.[24]

Therefore, since the petitioning districts were the owners of the portion of the water legally contracted to them, after deducting the water to which the respondents were entitled, they were clearly proper parties in this case.

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[23]"Vested rights were unaffected. All permits and licenses issued by the statutory agency (now the State Water Board) are declared therein to be 'subject to vested rights,' (Cal. State Water Board, 'Rules, Regulations and Information pertaining to Appropriation of Water in California' (1956); see, Meridian, Ltd. v. City and County of San Francisco, 13 Cal. 2d 424, 450, 90 P. 2d 537, 91 P. 2d 105; Rank v. Krug, D. C. 142 F. Supp. 1)."
United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 831 (1958).

[24]"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A., pages 382-372, provided: "* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated * * * although the government diverted stored and distributed the water, the contention of the petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowners and by the terms of the law * * * *the water rights became the property of the landowners* wholly distinct from the property right of the government in the irrigation works." (emphasis ours)
State of Nebraska v. State of Wyoming, 325 U. S. 589, 613; 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);
Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416; 81 L. Ed. 525 (1937).

The Answers of most of the petitioning districts, although not claiming they are the legal owners of rights under a Reclamation project which have been legally contracted to them, claim they are the *equitable owners* thereof, and as such were proper parties and properly subject to the injunction of the District Court.[25]

"VII. Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant district, have become and are the beneficiaries of that trust; * * *."

R. 158. Excerpt from Answer to Plaintiffs' Complaint as Amended of Petitioning Districts, Lindsay-Strathmore Irrigation District, Lindmore Irrigation District, Ivanhoe Irrigation District, Orange Cove Irrigation District, Sausalito Irrigation District, Tulare Irrigation District, Lower Tule River Irrigation District, Stone Corral Irrigation District, Terra Bella Irrigation District, Porterville Irrigation District, Delano-Earlimart Irrigation District and Exeter Irrigation District, filed 10/16/61.

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[25] "II. Answering Paragraph IV of said complaint in intervention, these answering defendants admit the allegations therein contained, save and excepting that defendants allege that the assignments therein set forth were assigned in trust to the United States, all as set forth in Paragraph VII of said Amended Complaint in Intervention."

R. 125, Excerpt from Answer of Southern San Joaquin Municipal Utility District to State of California's Amended Complaint in Intervention, page 2.

Petitioner Southern San Joaquin Municipal Utility District similarly answered.

The State of California made a similar allegation in their Amended Complaint in Intervention filed August 10, 1951, R. 88, 95.

All petitioners were therefore proper parties and subject to the injunction under the provisions of Section 379, Code of Civil Procedure, State of California.

> "Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff."
>
> *Calif. Code of Civil Procedure, 379.*

2. All of the Petitioning Districts, Except Southern San Joaquin Municipal Utility District, Madera Irrigation District and Chowchilla Irrigation District, Together With the Bureau of Reclamation Officials and the State of California Voluntarily Intervened in This Action. Later the Madera and Chowchilla Irrigation Districts and Southern San Joaquin Municipal Utility District Asked for Affirmative Relief by Agreeing to the Consent Decree of the District Court Ordering a Physical Solution and at the Pre-Trial Conference Asked the Court to Make a Physical Solution.

All districts with the exception of Madera Irrigation District, Chowchilla Irrigation District and Southern San Joaquin Municipal Utility District voluntarily intervened in this case. Moreover, *all* of the districts, the State of California and the Bureau of Reclamation officials asked for affirmative relief in this case by requesting the District Court either in their answers, other pleadings filed in this case or in state-

ments made at the pre-trial conference to make a physical solution.

"(2). That the injunction as prayed for in the complaint be denied and that a physical solution, if possible, be directed;"

R. 174. Excerpt from Answer to Plaintiffs' Complaint as Amended of Petitioning Districts, Lindsay-Strathmore Irrigation District, Lindmore Irrigation District, Ivanhoe Irrigation District, Orange Cove Irrigation District, Sausalito Irrigation District, Tulare Irrigation District, Lower Tule River Irrigation District, Stone Corral Irrigation District, Terra Bella Irrigation District, Porterville Irrigation District, Delano-Earlimart Irrigation District and Exeter Irrigation District, filed 10/16/61.

Later these three exceptions through their counsel Mr. Green, Mr. Reavis and Mr. Brett, joined the other petitioning districts in asking for a physical solution.

Mr. Green, representing Madera Irrigation District and Chowchilla Irrigation District, joined the other districts in a request for a physical solution.

"Mr. Green: * * * then let us try this physical solution within the limits of the boundaries of the people whom he represents as surface diverters, because they are in a different category than the people below the point at Gravelly Ford."

Statement of Counsel Denslow Green, counsel for Madera Irrigation District and Chowchilla Irrigation District, Rep. Tr. 306.

Mr. Reavis and Mr. Brett, representing Southern San Joaquin Municipal Utility District joined the State of California in asking that the State of California's plan of physical solution be accepted.[26]

Mr. Reavis, representing the Southern San Joaquin Municipal Utility District, also specifically stated that he agreed with the State's position that the plaintiffs must submit to a physical solution. [Rep. Tr. p. 119, line 25, 12/20/51.] Furthermore, Mr. Reavis, now representing the Southern San Joaquin Municipal Utility District, *in his written pre-trial statement* filed January 29, 1952, also *specifically approved and asked for a physical solution.*[27]

The State of California, also in its answer and complaint in intervention, requested the affirmative relief of a physical solution. They alleged that the plaintiffs "must submit"[28] to a decree of physical solution and that it was the "duty of the court"[29] to make such a

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[26]R. 294 (New Volume) "Objection to Form of Proposed Judgment (Under Local Rule 7(a))," page 2, filed by attorneys Reavis and Brett for Southern San Joaquin Municipal Utility District.

[27]"While not incorporated in our Answer, we are in harmony with the efforts of the respective parties to achieve a physical solution of the problem of the riparian owners between Friant and Gravelly Ford, and will, during the trial, offer an expert witness to support one or more of the proposed plans for the physical solution heretofore submitted to the Court."

Written Pre-Trial Statement of J. O. Reavis, Attorney for Southern San Joaquin Municipal Utility District, filed January 29, 1952.

[28]"That the plaintiffs * * * *must submit* to a physical solution * * *." (emphasis ours)

R. 150, Answer of State of California to Complaint.

[29]"* * * it is the duty of the Court to determine whether there is a physical solution * * *."

R. 149, Answer of State of California to Complaint.

decree of physical solution and that a physical solution was "feasible."[30]

Arvin Shaw, one of the leading water attorneys of the State of California, who represented the State of California in this case along with B. Abbott Goldberg, specifically demanded that the Court make a physical solution.[31]

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[30]"* * *. Alleges that a physical solution or solutions are possible and feasible * * *."

R. 149, Answer of State of California to Complaint.

[31]"Mr. Shaw. Under the decisions of the Supreme Court of California the question of physical solution is one which may be in this case the major question which the court has to determine, granting that there can be subsidiary and collateral things which the court must direct its attention to ultimately."

Statement of California Deputy Attorney General, Pre-Trial Conference, 12/20/51, Rep. Tr. 16.

"Mr. Shaw. * * * a large amount of technical and expert testimony may be eliminated, if the court would care to direct the order of proof at the trial, first to the issue of physical solution."

Pre-Trial Conference, 12/20/51, Rep. Tr. 17.

"Mr. Shaw. I am reinforced in the feeling that that would be worthwhile by examination of the three plans, because it is observable from them that *all three adopt the same approach to the solution of the problem, that is, the installation of checkdams* and other channel improvements, and so forth, and they *all three use the same method as well as the same approach.*

"The significant difference between the three plans is that the Bureau officials' plan contemplates one check-dam, with the statement that experience and observation * * * may lead to the advisability of several additional check-dams.

"The State's plan specifically calls for five check-dams instead of one.

"The plaintiffs' plan specifically calls for 12.

"* * * they indicate a general consensus on the part of all three interests which have submitted plans that a physical solution is possible which will equitably protect the riparian and underground basins in reasonable beneficial use of water from the San Joaquin River, * * *.

"* * * I would move, that the court now consider the making of an order directing the order of proof at the commencement of the trial to this subject of physical solution, * * *.

Mr. Abercrombie who spoke for the petitioning districts also demanded a physical solution.[32]

3. Here All of the Petitioning Districts Have Asked Affirmative Relief Viz. and Counter Claimed and Then Proceeded to Trial. It Is Now Too Late to Ask a Dismissal.

Since all of the petitioning districts asked affirmative relief, it is submitted under the following authorities that it is too late at this stage of the action for the districts to ask for a dismissal.

> "The second sentence of Rule 41(b) provides that after the plaintiff has completed the presentation of his evidence, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief * * *. If the motion is denied, the defendant may proceed to offer evidence. *If he does proceed he waives any right to object later that his motion was erroneously denied.*" (emphasis ours)
>
> *Moore's Fed. Practice 5, 1041;*
>
> *Century Indemnity Co. v. Nelson*, C. C. A. (9th Cir.), 1936, 90 F. 2d 644.

> "Rule 41(c) Dismissal of Counter Claim, Cross Claim, or Third Party Claim. The provisions of

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"I think that it is the function of the court in considering a physical solution, to determine the validity of any plan and to decide what the plan should be." (emphasis ours)

Pre-Trial Conference, 12/20/51, Rep. Tr. 17.

[32]"The Court. Mr. Abercrombie, I think most all of the districts have looked upon you more or less as a spokesman. What are your views on this pre-trial situation?

"Mr. Abercrombie. * * * we feel that a physical solution is more economical, more practical and, as I say, without committing ourselves to any particular solution, we think the court's inquiry should be directed to that just as Mr. Shaw says."

R. 12, Pre-Trial Conference, 12/20/51, Rep. Tr. 27.

this rule apply to the dismissal of any counter claim, cross claim or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsible pleading is served or, *if there is none, before the introduction of evidence at the trial or hearing.*" (emphasis ours)

Moore's Fed. Practice 5, 1049.

4. Water Rights Are a Form of Real Property and Interference With the Same Is a Trespass.

"Id. Common Law As To Riparian Rights—Extent And Nature Of Right. By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it." (Syllabus)

Lux v. Haggin, 69 Cal. 255, 258 (1886).

5. The Petitioning Districts, as Joint Trespassers, Were Proper Parties in This Action and Were Properly Joined.

(a) *Because Petitioners Claim an Interest in the Controversy.*

"Who may be joined as Defendants. Any person may be made a defendant who has or *claims* an interest in the controversy adverse to plaintiff."

Calif. Code of Civil Procedure 379.

"It is enough if he is found acting in concert with them."

52 Am. Jur. 861.

"The official character of the officer does not justify a trespass *and all who form or participate in*

the trespass are jointly liable with the officer." (emphasis ours)

48 Cal. Jur. 2d 32;

Lewis v. Johns, 4 C. 629 (1868):

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages."

48 Cal. Jur. 2d 31;

Foley v. Martin, 142 C. 256, 75 P. 842 (1904).

(b) *Because They Had an Interest in the Success of Either of the Parties.*

"At any time before trial any person who has an interest in the matter in litigation *or in the success of either of the parties* * * * may intervene in the action or proceeding." (emphasis ours)

C. C. P. 387.

"The right to intervene is not limited to any particular kind or class of actions but is general * * * to avail himself of the right the applicant must have an interest in the matter of litigation *or in the success of one of the parties to the action.*"

20 Cal. Jur. 517.

(c) *Because They Promoted, Encouraged, Advised, Conspired in, Aided, Assisted, and Abetted the Commission of the Trespass by the Bureau of Reclamation Officials.*

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is

equally liable with him who does the act complained of." (Syllabus)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373 (5th Cir.) (1956).

"31. Co-trespassers—It may be stated as a general rule that all persons who command, instigate, promote, *encourage*, *advise*, *countenance*, *co-operate in*, *aid*, or *abet* the commission of a trespass, or who approve it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves." (emphasis ours)

52 Am. Jur. 861.

(d) *Because Petitioners Approved the Illegal Actions of the Bureau Officials Which Were Done for Their Benefit.*

"Co-trespassers * * * all persons * * * who approve of it (a trespass) if it was done for their benefit. * * *."

52 Am. Jur. 861.

(e) *Because They Ratified the Illegal Acts of the Bureau of Reclamation Officials. "Ratification of Trespass" Is Ground Here.*

"32. *Ratification of Trespass—By Ratification* or *adoption* of a trespass committed for one's benefit, a person may, although absent when the trespass was committed, become a principal and liable accordingly, even though the act was not done in obedience to his command or at his request." (emphasis ours)

52 Am. Jur. 862.

By entering into a contract with the Bureau of Reclamation officials after knowledge of the lawsuit, accepting the benefits of the valuable irrigation water, furnishing attorneys and engineers at the trial of the action, and participating in the trial for a period of 18 months, the petitioning Districts clearly ratified the illegal actions of the Bureau officials and were clearly proper parties in the present action.

(f) *Because the Petitioning Districts Encouraged the Bureau Officials' Trespass Against the Plaintiffs.*

"33. Persons Authorizing, Encouraging, or Directing Trespass. Any Person who aids, abets, encourages, or authorizes another in the commission of a trespass, even though not personally present at its commission, is liable equally with him who commits it."

52 Am. Jur. 862.

(g) *The Petitioners Authorizing the Doing of an Act of Trespass by Another, or Ordering the Doing of a Trespass, or Advising It, Encouraged, Procured, or Incited the Acts of the Bureau Officials and Were Therefore Liable. The Petitioners Need Not Be Present in Order to Be Liable.*

"The person authorizing the doing of an act of trespass by another is liable, whether the authorization is express *or implied*. * * * advises it, encourages, procures, or incites it, or conspires with the actual doer for the doing of it is liable. * * *." (emphasis ours)

87 C. J. S. 987.

"* * *. In general, anyone who aids or cooperates with another in the commission of a trespass is liable for it."

87 C. J. S. 987.

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373 (5th Cir.) (1956).

"'* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.'" (*McDaniel Bros. v. Wilson*, Tex. Civ. App. 70 S. W. 2d 618, 621.)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373, 375.

(h) *Petitioning Districts' Liability Is Not Excused Even Though the Acts of Bureau Officials Be Considered Those of an Independent Contract.*

The fact that the Petitioning Districts had a contract with the defendant Bureau of Reclamation officials does not relieve the Districts; the Districts were still co-trespassers.

"'* * * that liability for trespass is not dependent upon personal participation. One who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of.'" (*McDaniel Bros. v. Wilson*, Tex. Civ. App., 70 S. W. 2d 618, 621.)

"*The rule stated is applicable where the party who cut the timber is an independent contractor.* (*Cummer Mfg. Co. v. Copeland*, Tex. Civ. App., 35 S. W. 2d 758.)" (Syllabus) (emphasis ours)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373, 375 (5th Cir.) (1956).

(i) *Petitioners as Shown by Pages 27 and 41 of Their Brief Are Still Cooperating With Bureau Officials and Asking Relief in Favor of Bureau Officials.*

There could be no stronger nor more conclusive evidence that the petitioning districts are aiding, abetting and assisting the Bureau officials in view of pages 27 and 41 of their brief, where they ask, request and pray this Court to reverse the holding of the Court below decreeing that the United States has not acquired respondents' rights. If nothing else had been shown here clearly petitioners have made themselves necessary parties, and it is submitted that the original injunction of the District Court should be applied to petitioning districts and that the modification of said injunction by the Court of Appeals should be reversed.

"Where * * * an agent has committed a trespass acting under authority from his principal, they may be jointly or severally sued for damages."

48 Cal. Jur. 2d 31.

"In action to enjoin alleged tortious misconduct of officials of government railroad in interfering with plaintiff's business of lightering ships by preventing plaintiffs from using a dock necessary to that business the government was not an indispensable party even though action involved ques-

tion as to whether the United States or City owned dock since action could conclude nothing against United States."

Berger v. Ohlson, 120 F. 56 (9th Cir.) (1941).

Counsel for each of the districts also insisted that each counsel have the right to cross-examine each of respondents' witnesses and in some cases the districts' counsel continuously examined respondents' witnesses for over a month at a time at a heavy cost to respondents.

Since the petitioning districts, not the United States, owned the water in dispute (subject to Respondents' vested rights) and demanded the right to and actually took an active part in the trial and appeal of this action and continuously insisted that they were proper parties and entitled to be heard in this action (until their motion for rehearing in the Court below) and claimed in their pleadings to be the equitable owners of the waters, which are the subject of this suit, it is respectfully submitted that the petitioning districts are proper and necessary parties herein, and should not be dismissed from this action, nor should the court below have modified the injunction against them.

In order to make a complete determination in all issues in this case and all parties herein, the districts should be retained as parties and it should be determined, as the districts claim in their answers, which claim was never revoked, that they are the equitable owners of the waters involved in this law suit, subject to the vested rights of respondents.

As regards the other issues in this case such as domestic and municipal priority, whether the United States

is an indispensable party or only a necessary party, and whether the Bureau of Reclamation officials were exceeding their statutory authority delegated to them by Congress, we refer to and incorporate herein the discussion in our brief of October 20, 1962, companion case No. 51, October Term, of this Court, as regards these disputed powers.

VII.
CONCLUSION.

We specifically ask this Court to sustain the holding of the Court below that petitioners have not acquired respondents' rights by eminent domain and reverse the decision of the Court below that petitioners can and are authorized to acquire respondents' rights by eminent domain.

We further ask this Court to overrule the Court below in its decision modifying the injunction of the District Court as against petitioners and to sustain the lower Court in refusing to dismiss this action against petitioners entirely. In addition we again ask this Court to take the same action that we, as petitioners, asked in our brief in companion case No. 51, October Term, 1962, of this Court, which action is again stated as follows:

That this Court reverse the Court below in the matters in which the Court below reversed the District Court in its decisions in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) and affirm the decision of the District Court in its entirety in that case; or if this is too broad a prayer we ask this Court to:

1. Affirm the decision of the Court below in all particulars in which it did not reverse the District

Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956).

2. Reverse the Court below on the following points:

(a) Reverse the holding of the Court below that Bureau of Reclamation officials can take the riparian and percolating water rights of the landowners between Friant and Gravelly Ford Canal, said reversal to be on the ground that Congress has never authorized a taking of these rights.

(b) Reverse the holding of the Court below that Bureau officials can take either by eminent domain or condemnation the overlying percolating water rights of appellant City of Fresno, said reversal to be on the ground that Congress has never authorized such taking.

(c) Reverse the holding of the Court below that the determination of the statutory limits of authority of Bureau officials is an administrative and not a judicial determination.

(d) Reverse the holding of the Court below that the determination of whether the charge for water to the City of Fresno out of the Central Valley Project is reasonable or unreasonable, arbitrary, capricious or in excess of their statutory authority is an administrative and not a judicial decision.

(e) Reverse the holding of the Court below that the determination of whether rates charged for water by Bureau official to the City of Fresno in excess of $3.50 per acre-foot (Class I irrigation water) is unreasonable, arbitrary, capricious and in excess of the authority of Bureau officials in an administrative and not a judicial determination and

that such a determination is a suit against the United States.

(f) Reverse the holding of the Court below that the City of Fresno is not entitled as a matter of judicial determination to purchase necessary water out of the Central Valley Project at rates which are not unreasonable, arbitrary, capricious or in excess of the statutory authority of Bureau officials to the extent of the needs of the City of Fresno.

(g) Reverse the holding of the Court below that Petitioning districts should be relieved of the injunction the District Court imposed on the petitioning districts and Bureau officials and sustain the holding of the Court below refusing to dismiss the petitioning districts as parties herein.

(h) Reverse the holding of the Court below that the United States has not waived its immunity to suit in this action under the Act of July 10, 1952, 66 Stat. 516, and the Reclamation Act of June 17, 1902, 32 Stat. 388, and other actions of government officials.

(i) Specifically hold that Bureau officials are not authorized by Congress to add a profit to water rates charged cities under reclamation projects in addition to repayment of a proportionate share of construction costs and operation and maintenance costs plus interest at not to exceed 3½ per cent.

(j) Affirm the decision of the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956), that any charge to the City of Fresno for water out of the Central Valley Project which

has no municipal or domestic priority such as has been offered to the City of Fresno at rates greater than Class I irrigation rates, ($3.50 per acre-foot) is unreasonable since no point on designation on points on appeal was made by any petitioner and since no point was raised by any petitioner on this point in any petition for certiorari in this court.

(k) Reverse the Court below and specifically affirm the decision of the District Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956), that the City of Fresno is entitled as a matter of right (in accordance with the California watershed and county of origin statutes and the California domestic and municipal priority statutes which the Bureau officials are required to carry out by virtue of the basic reclamation law of 1902 and the various acts of Congress governing the Central Valley Project which provide that the project and particularly Friant Dam shall supply the domestic and municipal water needs of the City of Fresno) to water out of the Central Valley Project sufficient to supply its needs. Or this Court should at least hold Fresno entitled to a minimum of 100,000 acre-feet per year of Central Valley Project water which *engineers* for *re-Bureau officials* testified were the minimum water requirements of the City of Fresno.

Respectfully submitted,

JOHN H. LAUTEN, and
CLAUDE L. ROWE,
Attorneys for Respondent City of Fresno.

CLAUDE L. ROWE,
Attorney for All Other Respondents.

Dated: December 3, 1962.